



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

FINAL DECISION

December 22, 2009 Government Records Council Meeting

James Logue
Complainant

Complaint No. 2008-223

v.

Borough of Fieldsboro (Burlington)
Custodian of Record

At the December 22, 2009 public meeting, the Government Records Council (“Council”) considered the December 9, 2009 Supplemental Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Because the Custodian submitted to the GRC a certification with respect to the Complainant’s refusal to purchase the requested records within the time period ordered by the Council, the Custodian complied with the Council’s November 4, 2009 Interim Order.
2. Although the Custodian’s failure to provide a written response to the Complainant’s OPRA request within the statutorily mandated seven (7) business days resulted in a “deemed” denial, because the Custodian did provide a verbal response to the Complainant on the sixth (6th) business day following the date of the Complainant’s request informing the Complainant that the requested records would be disclosed to the Complainant upon the Complainant’s payment of a \$500.00 special service charge deposit, it is concluded that the Custodian’s actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian’s unlawful “deemed” denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

This is the final administrative determination in this matter. Any further review should be pursued in the Appellate Division of the Superior Court of New Jersey within forty-five (45) days. Information about the appeals process can be obtained from the Appellate Division Clerk’s Office, Hughes Justice Complex, 25 W. Market St., PO Box 006, Trenton, NJ 08625-0006. Proper service of submissions pursuant to any appeal is to



be made to the Council in care of the Executive Director at the State of New Jersey Government Records Council, 101 South Broad Street, PO Box 819, Trenton, NJ 08625-0819.

Final Decision Rendered by the
Government Records Council
On The 22nd Day of December, 2009

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Harlynn A. Lack, Secretary
Government Records Council

Decision Distribution Date: January 5, 2010

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Supplemental Findings and Recommendations of the Executive Director
December 22, 2009 Council Meeting**

**James Logue¹
Complainant²**

GRC Complaint No. 2008-223

v.

**Borough of Fieldsboro (Burlington)³
Custodian of Records**

Records Relevant to Complaint:

1. The number of cell phones issued and to whom they are issued.
2. The total cost per year for cell phones from January 1, 2003 to the date of request.
3. All e-mail correspondence to/from Edward Tyler and Tim Tyler.
4. Copies of minutes from January 1, 2003 to date of request.⁴

Request Made: September 22, 2008⁵

Response Made: September 30, 2008

Custodian: Patrice M. Hansell

GRC Complaint Filed: October 6, 2008⁶

Background

November 4, 2009

At the November 4, 2009 public meeting, the Government Records Council (“Council”) considered the October 21, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, found that:

1. Although the Custodian verbally notified the Complainant on the sixth (6th) business day following receipt of the Complainant’s OPRA request that the Custodian would require a deposit from the Complainant before fulfilling his

¹The Complainant names three (3) other co-complainants on the Denial of Access Complaint; however, the Complainant is the only signatory.

²No legal representation listed on record.

³Represented by Kenneth S. Damzalski, Esq. (Burlington, NJ).

⁴The Custodian certified that the Complainant was seeking council meeting minutes.

⁵The request is dated September 20, 2008 and the Custodian certifies that this is the date of the request; however, the Complainant submitted a legal certification averring that September 22, 2008 was the date of the request and that he went to the municipal building on that date to personally prepare and submit the request. September 20, 2008 was a Saturday, not a normal business day. September 22, 2008 was a Monday which is a business day and therefore supports the Complainant’s certification.

⁶The GRC received the Denial of Access Complaint on said date.

request, the Custodian's failure to respond in writing to the Complainant's request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007) and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

2. Because the municipality has scant resources, and because of the extraordinary volume, time, and effort that will be required to fulfill the Complainant's OPRA request, the \$500.00 special service charge deposit assessed by the Custodian is valid and reasonable pursuant to N.J.S.A. 47:1A-5.c. and the Superior Court's decision in The Courier Post v. Lenape Regional High School, 360 N.J. Super. 191 (Law Div. 2002) and the Custodian properly required payment of said special service charge deposit prior to disclosure of the requested records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
3. Because the Complainant's request for Item #1, the number of cell phones issued and to whom they are issued, constitutes a request for information and does not identify with reasonable clarity a specific identifiable government record, and because OPRA neither requires custodians to research files to discern which records may be responsive to a request nor requires custodians to create new records, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).
4. Because the Council has determined that the special service charge deposit assessed by the Custodian is valid and reasonable, the records responsive to request Item #2, copies of the redacted phone bills, shall not be disclosed to the Complainant until the Complainant pays the requested five hundred dollar (\$500.00) special service charge deposit.
5. Because the Custodian certified that she responded to the Complainant indicating that there are no records responsive for Item #3 of the Complainant's request, and because the Complainant failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. Because the Council has determined that the special service charge deposit assessed by the Custodian is valid and reasonable, the Complainant's request

for Item #4, copies of council meeting minutes from January 1, 2003 to the date of request, shall not be disclosed to the Complainant until the Complainant pays the requested five hundred dollar (\$500.00) special service charge deposit.

7. **The Complainant shall comply with paragraph 4 and 6 above within five (5) business days from receipt of the Council's Interim Order by delivering to the Custodian (a) a special service charge deposit in the amount of five hundred dollars (\$500.00), or (b) a statement declining to purchase the records. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within seven (7) business days from receipt of the Council's Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.⁷**
8. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

November 6, 2009

Council's Interim Order distributed to the parties.

November 17, 2009

Custodian's certification in response to the Council's Interim Order. The Custodian certifies that she received from the Complainant neither the five hundred dollar (\$500.00) special service charge deposit with a request for copies of the records nor a statement from the Complainant declining to purchase the records.

Analysis

Whether the Custodian complied with the Council's November 4, 2009 Interim Order?

The Council's November 4, 2009 Interim Order directed the Complainant within five (5) business days from receipt of the Council's Interim Order to either pay a five hundred dollar (\$500.00) special service charge deposit to the Custodian for copies of the records that the Council determined were subject to disclosure or deliver to the Custodian a statement declining to purchase the records. The Complainant's failure to take any action within the five (5) business day period was to be treated as a declination to

⁷ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

purchase the records. The Custodian was granted seven (7) business days from receipt of the Council's Interim Order to provide a certification to the GRC with respect to the Complainant's willingness or refusal to purchase the requested records.

Pursuant to the Council's Interim Order, the last date for the Complainant to pay the special service charge deposit for copies of the records or deliver to the Custodian a statement declining to purchase the records was November 16, 2009. The Custodian submitted to the GRC a certification dated November 17, 2009 in a timely manner, wherein the Custodian certified that she did not receive any correspondence from the Complainant either submitting the deposit with a request for the records or declining to purchase the records. As provided in the Interim Order, the Complainant's failure to act in a timely manner operates as a statement declining to purchase the records and relieves the Custodian of any further obligation to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff, supra.

Accordingly, because the Custodian submitted to the GRC a certification with respect to the Complainant's refusal to purchase the requested records within the time period ordered by the Council, the Custodian complied with the Council's November 4, 2009 Interim Order.

Whether the Custodian's delay in granting access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that "[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ..." N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

"... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]..." N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a "knowing and willful" violation of OPRA. The following statements must be true for a determination that the Custodian "knowingly and willfully" violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001)); the Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed,

knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian did provide a verbal response to the Complainant on the sixth (6th) business day following the date of the Complainant's request informing the Complainant that the requested records would be disclosed to the Complainant upon the Complainant's payment of a \$500.00 special service charge deposit, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Because the Custodian submitted to the GRC a certification with respect to the Complainant's refusal to purchase the requested records within the time period ordered by the Council, the Custodian complied with the Council's November 4, 2009 Interim Order.
2. Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian did provide a verbal response to the Complainant on the sixth (6th) business day following the date of the Complainant's request informing the Complainant that the requested records would be disclosed to the Complainant upon the Complainant's payment of a \$500.00 special service charge deposit, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

December 9, 2009



State of New Jersey
GOVERNMENT RECORDS COUNCIL
101 SOUTH BROAD STREET
PO BOX 819
TRENTON, NJ 08625-0819

JON S. CORZINE
Governor

CHARLES A. RICHMAN
Acting Commissioner

INTERIM ORDER

November 4, 2009 Government Records Council Meeting

James Logue
Complainant

Complaint No. 2008-223

v.

Borough of Fieldsboro (Burlington)
Custodian of Record

At the November 4, 2009 public meeting, the Government Records Council ("Council") considered the October 21, 2009 Findings and Recommendations of the Executive Director and all related documentation submitted by the parties. The Council voted unanimously to adopt the entirety of said findings and recommendations. The Council, therefore, finds that:

1. Although the Custodian verbally notified the Complainant on the sixth (6th) business day following receipt of the Complainant's OPRA request that the Custodian would require a deposit from the Complainant before fulfilling his request, the Custodian's failure to respond in writing to the Complainant's request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007) and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the municipality has scant resources, and because of the extraordinary volume, time, and effort that will be required to fulfill the Complainant's OPRA request, the \$500.00 special service charge deposit assessed by the Custodian is valid and reasonable pursuant to N.J.S.A. 47:1A-5.c. and the Superior Court's decision in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191 (Law Div. 2002) and the Custodian properly required payment of said special service charge deposit prior to disclosure of the requested records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
3. Because the Complainant's request for Item #1, the number of cell phones issued and to whom they are issued, constitutes a request for information and



does not identify with reasonable clarity a specific identifiable government record, and because OPRA neither requires custodians to research files to discern which records may be responsive to a request nor requires custodians to create new records, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

4. Because the Council has determined that the special service charge deposit assessed by the Custodian is valid and reasonable, the records responsive to request Item #2, copies of the redacted phone bills, shall not be disclosed to the Complainant until the Complainant pays the requested five hundred dollar (\$500.00) special service charge deposit.
5. Because the Custodian certified that she responded to the Complainant indicating that there are no records responsive for Item #2 of the Complainant's request, and because the Complainant failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. Because the Council has determined that the special service charge deposit assessed by the Custodian is valid and reasonable, the Complainant's request for Item #4, copies of council meeting minutes from January 1, 2003 to the date of request, shall not be disclosed to the Complainant until the Complainant pays the requested five hundred dollar (\$500.00) special service charge deposit.
7. **The Complainant shall comply with paragraph 4 and 6 above within five (5) business days from receipt of the Council's Interim Order by delivering to the Custodian (a) a special service charge deposit in the amount of five hundred dollars (\$500.00), or (b) a statement declining to purchase the records. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within seven (7) business days from receipt of the Council's Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The**

Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.¹

8. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Interim Order Rendered by the
Government Records Council
On The 4th Day of November, 2009

Robin Berg Tabakin, Chair
Government Records Council

I attest the foregoing is a true and accurate record of the Government Records Council.

Janice L. Kovach, Secretary
Government Records Council

Decision Distribution Date: November 6, 2009

¹ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."

**STATE OF NEW JERSEY
GOVERNMENT RECORDS COUNCIL**

**Findings and Recommendations of the Executive Director
November 4, 2009 Council Meeting**

**James Logue¹
Complainant²**

GRC Complaint No. 2008-223

v.

**Borough of Fieldsboro (Burlington)³
Custodian of Records**

Records Relevant to Complaint:

1. The number of cell phones issued and to whom they are issued.
2. The total cost per year for cell phones from January 1, 2003 to the date of request.
3. All e-mail correspondence to/from Edward Tyler and Tim Tyler.
4. Copies of minutes from January 1, 2003 to date of request.⁴

Request Made: September 22, 2008⁵

Response Made: September 30, 2008

Custodian: Patrice M. Hansell

GRC Complaint Filed: October 6, 2008⁶

Background

September 22, 2008

Complainant's Open Public Records Act ("OPRA") request. The Complainant requests the records relevant to this complaint listed above on an official OPRA request form.

September 30, 2008

Custodian's response to the OPRA request. The Deputy Clerk, Ms. Tracy Muni ("Deputy Clerk"), responds to the Complainant's OPRA request by telephoning the Complainant and leaving a verbal message on the Complainant's voice mailbox on the sixth (6th) business day following receipt of such request. The Custodian states that the records responsive to the Complainant's request would be made available in a couple of

¹The Complainant names three (3) other co-complainants on the Denial of Access Complaint; however, the Complainant is the only signatory.

²No legal representation listed on record.

³Represented by Kenneth S. Damzalski, Esq. (Burlington, NJ).

⁴The Custodian certified that the Complainant was seeking council meeting minutes.

⁵The request is dated September 20, 2008 and the Custodian certifies that this is the date of the request; however, the Complainant submitted a legal certification averring that September 22, 2008 was the date of the request and that he went to the municipal building on that date to personally prepare and submit the request. September 20, 2008 was a Saturday, not a normal business day. September 22, 2008 was a Monday which is a business day and therefore supports the Complainant's certification.

⁶The GRC received the Denial of Access Complaint on said date.

weeks, but that the Custodian would first need a deposit from the Complainant in the amount of \$500.00.

October 6, 2008

Denial of Access Complaint filed with the Government Records Council (“GRC”) with the following attachments:

- Complainant’s OPRA request dated September 20, 2008
- Certification of James Logue dated October 3, 2008

The Complainant avers in a certification attached to his complaint that he visited the municipal building on September 22, 2008 and obtained an official OPRA request form from the Clerk who identified herself as Tracy, whereupon he immediately completed and submitted his OPRA request for the records relevant to this complaint. The Complainant further certifies that Tracy informed him that she was not authorized to process his OPRA request or otherwise help him at that time. The Complainant avers that on September 29, 2008 he telephoned Tracy to check on the status of his OPRA request. The Complainant further avers that Tracy stated she would call him back later that day; however, the Complainant contends Tracy did not call back until September 30, 2008, at which time she left the Complainant a message informing him that he would have to remit a \$500.00 deposit and thereafter it would take two or three weeks to fulfill his OPRA request.

The Complainant states the he filed his complaint because the Custodian failed to respond to his OPRA request within the statutorily-mandated time frame and therefore his request is deemed denied. The Complainant further states that he has been assessed a special service charge of \$500.00; however, the Custodian failed to provide evidence that an extraordinary amount of time and effort would be needed to accommodate his request in accordance with N.J.S.A. 47:1A-5.c. The Complainant contends the Custodian also failed to address the fourteen (14) factors established by the GRC for situations which may warrant a special service charge as decided by the Council in Donato v. Jersey City Police Department, GRC Complaint No. 2005-251 (April 2007).

The Complaint asserts that the Custodian’s actions amount to a knowing and willful violation of OPRA and that the Custodian should be subject to a civil penalty pursuant to N.J.S.A. 47:1A-11.

The Complainant does not agree to mediate this complaint.

October 6, 2008

Request for the Statement of Information sent to the Custodian.

October 10, 2008

Custodian’s Statement of Information (“SOI”) attaching the Complainant’s OPRA request dated September 20, 2008.

The Custodian’s certification is deficient because it identifies two different persons as the responsible Custodian in this matter. Further, the Custodian failed to

complete the document index required pursuant to the Superior Court's decision in Paff v. NJ Department of Labor, 392 N.J. Super. 334 (App. Div. 2007).

October 10, 2008

Letter from the GRC to the Custodian. The GRC returns the SOI to the Custodian and informs the Custodian that the deficiencies in the SOI must be corrected and the conforming SOI must be returned to the GRC by October 16, 2008.

October 15, 2008

Custodian's SOI attaching the Complainant's OPRA request dated September 20, 2008.

The Custodian certified that she requested a special service charge deposit from the Complainant and was awaiting the Complainant's response before searching or copying the requested records. The Custodian certified that the cell phone payment records must be retained for six (6) years, e-mails must be retained for three (3) years and the meeting minutes are to be maintained permanently in accordance with the Records Destruction Schedule established and approved by New Jersey Department of State, Division of Archives and Records Management.

The Custodian certified that the Complainant's request was received on September 20, 2008 and that the Deputy Clerk responded to the Complainant's OPRA request by telephoning the Complainant on September 30, 2008 and leaving a verbal message in the Complainant's voice mail. The Custodian certified that she works on an "as needed" basis in a small municipality and to fulfill such a request will require additional time. The Custodian further certifies that the agency should be compensated for the additional time required to fulfill the Complainant's request. The Custodian certifies that the Complainant never replied to the voice mail message the Deputy Clerk left for him.

The Custodian's Counsel contends that the number of cell phones issued by the municipality and to who they are issued, listed as Item #1 of the Complainant's request, is a request for information and not a request for a government record. Counsel states that, notwithstanding his contention that the Complainant's request for information is not a valid OPRA request; the Custodian will not deny the Complainant access to the information.

Counsel also argues that Item #3 of the Complainant's request, which is a request for all e-mail correspondence between Edward Tyler and Tim Tyler, is vague and unclear. Counsel states that the request for this item must be more specific so that the Custodian can determine whether any such e-mails are government records. The Custodian's Counsel acknowledges that the remaining items of the Complainant's request are government records.

Counsel contends that the Complainant and the Custodian had an ongoing practice of verbal transactions, and that the difference in the instant complainant is that here the Complainant's request was politically motivated. Counsel argues that the Complainant was accommodated in the past and that if he had responded to the Custodian

as he had in the past he would have been accommodated here as well. Counsel states that the Custodian is able to disclose the requested records no later than ten (10) business days after the Custodian's requirements are accepted by the Complainant.

December 3, 2008

Letter from the GRC to the Custodian. The GRC asks the Custodian to provide the GRC with a response to 14 point special service charge questionnaire in order for the GRC to determine whether a special service charge is warranted in the instant complaint.

December 9, 2008⁷

Letter from the Custodian to the GRC. The Custodian responds to the GRC's letter dated December 3, 2008 and provides the GRC with answers to the questions asked by the GRC in order to determine whether a special service charge is warranted in this matter.

September 6, 2009

Custodian's certification. The Custodian certifies to the veracity of her answers to the questions asked by the GRC which the Custodian set forth in her letter to the GRC dated December 9, 2008.

Analysis

Whether the Custodian responded to the Complainant's request in a timely manner?

OPRA provides that:

"...[i]f the custodian is unable to comply with a request for access, the custodian shall indicate the specific basis therefor on the request form and promptly return it to the requestor. The custodian shall sign and date the form and provide the requestor with a copy thereof ..." (Emphasis added.) N.J.S.A. 47:1A-5.g.

OPRA further provides that:

"[u]nless a shorter time period is otherwise provided by statute, regulation, or executive order, a custodian of a government record shall grant access ... or deny a request for access ... as soon as possible, but not later than seven business days after receiving the request ... In the event a custodian fails to respond within seven business days after receiving a request, the failure to respond shall be deemed a denial of the request ..." (Emphasis added.) N.J.S.A. 47:1A-5.i.

In this complaint, the record reveals the Custodian received the Complainant's OPRA request on September 22, 2008. The Custodian certified that the Deputy Clerk, after consultation with the Custodian, called the Complainant and left a message on the

⁷ Additional correspondence was submitted by the parties. However, said correspondence is either not relevant to this complaint or restates the facts/assertions already presented to the GRC.
James Logue v. Borough of Fieldsboro (Burlington), 2008-223 – Findings and Recommendations of the Executive Director

Complainant's voice mail informing the Complainant that the Custodian would commence to process the Complainant's request upon receipt of a \$500.00 deposit. The Deputy Clerk concluded the message by informing the Complainant that it would take a couple of weeks for the requested information to be gathered. The Custodian certifies that she never provided a written response to the Complainant's OPRA request.

In a matter with a similar fact pattern as the instant complaint, DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007), the Custodian verbally advised the Complainant that she would not be able to provide the requested records within the seven (7) business day time frame. The Council held that:

“[w]hile the Custodian may have verbally contacted the Complainant within the statutorily mandated seven (7) business day time frame required to respond to OPRA requests, she failed to do so in writing, therefore creating a “deemed” denial of the request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i. and the Council's decision in Paff v. Bergen County Prosecutor's Office, GRC Complaint No. 2005-115 (March 2006).”

OPRA mandates that a custodian must either grant or deny access to requested records within seven (7) business days from receipt of said request. N.J.S.A. 47:1A-5.i. As also prescribed under N.J.S.A. 47:1A-5.i., a custodian's failure to respond within the required seven (7) business days results in a “deemed” denial. Further, the Custodian's response, either granting or denying access, must be in writing pursuant to N.J.S.A. 47:1A-5.g. The Custodian's failure to respond in writing to the Complainant's OPRA request granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days, as required by N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., results in a “deemed” denial of the Complainant's OPRA request. Tucker Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).

Here, although the Custodian verbally notified the Complainant on the sixth (6th) business day following receipt of the request that the Custodian would require a deposit from the Complainant before fulfilling his request and stating that the Custodian would need additional time to fulfill the request, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a “deemed” denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., and the Council's decisions in DeLuca, supra and Kelley, supra.

Whether the special service charge assessed by the Custodian is warranted and reasonable pursuant to OPRA?

OPRA provides that:

“[t]he actual cost of duplicating the record shall be the cost of materials and supplies used to make a copy of the record, but shall not include the cost of labor or other overhead expenses associated with making the copy

except as provided for in subsection c.” (Emphasis added.) N.J.S.A. 47:1A-5.b.

The above-referenced subsection provides:

“Whenever the nature, format, manner of collation, or volume of a government record embodied in the form of printed matter to be inspected, examined, or copied pursuant to this section is such that the record cannot be reproduced by ordinary document copying equipment in ordinary business size or involves an *extraordinary expenditure of time and effort to accommodate the request*, the public agency may charge, in addition to the actual cost of duplicating the record, a *special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copy or copies ...*” (Emphasis added.) N.J.S.A. 47:1A-5.c.

Whenever a records custodian asserts that fulfilling an OPRA records request requires an “extraordinary” expenditure of time and effort, a special service charge may be warranted pursuant to N.J.S.A. 47:1A-5.c. The determination of what constitutes an “extraordinary expenditure of time and effort” under OPRA must be made on a case by case basis and requires an analysis of a variety of factors. These factors were discussed in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191, 199 (Law Div. 2002). There, the plaintiff publisher filed an OPRA request with the defendant school district, seeking to inspect invoices and itemized attorney bills submitted by four law firms over a period of six and a half years. *Id.* at 193. Lenape assessed a special service charge due to the “extraordinary burden” placed upon the school district in responding to the request. *Id.*

Based upon the volume of documents requested and the amount of time estimated to locate and assemble them, the court found the assessment of a special service charge for the custodian’s time was reasonable and consistent with N.J.S.A. 47:1A-5.c. *Id.* at 202. The court noted that it was necessary to examine the following factors in order to determine whether a records request involves an “extraordinary expenditure of time and effort to accommodate the request” pursuant to OPRA:

- The volume of government records involved;
- The period of time over which the records were received by the governmental unit;
- Whether some or all of the records sought are archived;
- The amount of time required for a government employee to locate, retrieve and assemble the documents for inspection or copying;
- The amount of time, if any, required to be expended by government employees to monitor the inspection or examination;⁸ and
- The amount of time required to return the documents to their original storage place. *Id.* at 199.

⁸ The court stated that the government agency should bear the burden of proving that monitoring is necessary. *Id.* at 199.

The court determined that in the context of OPRA, the term “extraordinary” will vary among agencies depending on the size of the agency, the number of employees available to accommodate document requests, the availability of information technology, copying capabilities, the nature, size and number of documents sought, as well as other relevant variables. *Id.* at 202. “[W]hat may appear to be extraordinary to one school district might be routine to another.” *Id.*

Recognizing that many different variables may affect a determination of whether a special service charge is reasonable and warranted, the GRC established an analytical framework for situations which may warrant an assessment of a special service charge. This framework incorporates the factors identified in the Courier Post case, as well as additional relevant factors. For the GRC to determine when and whether a special service charge is reasonable and warranted, a Custodian must provide a response to each of the following inquiries:

1. What records are requested?
2. Give a general nature description and number of the government records requested.
3. What is the period of time over which the records extend?
4. Are some or all of the records sought archived or in storage?
5. What is the size of the agency (total number of employees)?
6. What is the number of employees available to accommodate the records request?
7. To what extent do the requested records have to be redacted?
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?
9. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?
12. Who (name and job title) in the agency will perform the work associated with the records request and that person’s hourly rate?
13. What is the availability of information technology and copying capabilities?
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.

In the complaint now before the Council, the Custodian responded to the above inquiries as follows:

QUESTION	CUSTODIAN’S RESPONSE ⁹
1. What records are requested?	<p>A. The number of cell phones issued by the township, and who receives them.</p> <p>B. The total cost per year for the cell phones from</p>

⁹ All responses are direct quotes from the Custodian; quotation marks have been removed.
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	<p>January 1, 2003 - present.</p> <p>C. All e-mail correspondence to/from Edward Tyler and Tim Tyler.</p> <p>D. Copies of minutes from January 1, 2003 - present.</p>
2. Give a general nature description and number of the government records requested.	As the request states they are requesting about 5 years of records for cost of cell phones and council meeting minutes which are approximately 35 pages for each month of each year requested. The request for all e-mail correspondence to/from Edward Tyler and Tim Tyler seems vague, but upon further review I have found that they do not communicate with each other through e-mail. The total cost of the cell phones can be created by the Treasurer.
3. What is the period of time over which the records extend?	5 years
4. Are some or all of the records sought archived or in storage?	I believe all of the records requested are relatively easily accessible.
5. What is the size of the agency (total number of employees)?	Fieldsboro employs a total of 28 employees (this includes all council members and police). Of the 28, the police and public works are the only employees that work full time (35 hours a week or more), this number varies but is about 3 – 4 employees that are full time.
6. What is the number of employees available to accommodate the records request?	The Deputy Clerk (who works 24 hours a week but part of that time is spent as the sewer and water collector) and the Clerk, who does not keep regular hours at the borough and works on an as-needed basis.
7. To what extent do the requested records have to be redacted?	For some of the requested information, it would be easier to create a new document than to redact the information. As an example. the Treasurer can create a document which will have only cell phone bill information on it. And number of cell phones issued and to who, rather than copy each phone bill and redact most of the information off the bill. And, any executive session minutes that were not approved for public view at this time would be left off.
8. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to locate, retrieve and assemble the records for copying?	Since the Deputy Clerk is busy with the daily working of the Clerk's Office, it would be required to have the Clerk come in to make the copies of the requested information. The Clerk's hourly rate for work done is estimated to be \$20.00 an hour. It is estimated that the total time it would take to complete the request would be between 10 and 15 hours.
9. What is the level of personnel, hourly rate and	This would only apply to the records that were to be obtained from the Treasurer's office, the Clerk would be

number of hours, if any, required for a government employee to monitor the inspection or examination of the records requested?	the one making copies of the minutes, so no additional personnel would be required.
10. What is the level of personnel, hourly rate and number of hours, if any, required for a government employee to return records to their original storage place?	Again, the Clerk would be taking on this task, along with the Treasurer, and it would take minimum time to place the records back into their original storage place. The estimated amount of time would be a total of about 1 to 2 hours.
11. What is the reason that the agency employed, or intends to employ, the particular level of personnel to accommodate the records request?	The Clerk and the Deputy Clerk are the appropriate people to fulfill the request for the records requested. Since the Deputy Clerk also works as the sewer and water collector, her extra time in the office is very limited. In order to fulfill the request in a timely manner it would be necessary to ask the Clerk to spend extra time in the office to help with the request.
12. Who (name and job title) in the agency will perform the work associated with the records request and that person's hourly rate?	Patrice Hansell, Municipal Clerk, \$20.00/hr. would be gathering the requested information.
13. What is the availability of information technology and copying capabilities?	The Borough has one copy machine that is shared by all departments; the copy machine is available to the Clerk's Office at all times. We also have the ability to make a copy from the computer to the printer for some documents.
14. Give a detailed estimate categorizing the hours needed to identify, copy or prepare for inspection, produce and return the requested documents.	The Municipal Clerk would prepare the 5 years of minutes requested and make those copies. The Municipal Clerk would create a document that would list the number of cell phones and who they are issued to as requested. The Municipal Clerk would direct the Treasurer to produce a document that listed the total cost of cell phones from January 1, 2003 to present. The Municipal Clerk would direct Mayor Tyler and Timothy Tyler to copy any e-mail correspondence between them to satisfy the request. As stated above in my response to number 2, the 2 individuals do not communicate with each other through e-mail. The cost for the copies would be \$.75 for the first 10 pages, \$.50 for pages 11 – 20 and \$.25 for each additional page. It is estimated that the amount for the copies would be in excess of the \$500.00 which was the original deposit requested to start the request.

The analysis for a special service charge under N.J.S.A. 47:1A-5.c. is two-pronged. First, it must be determined whether the special service charged is warranted. Second, if the special service charge was found to be warranted, an analysis of the reasonableness of the charge must be conducted.

Here, the records can be reproduced by ordinary document copying equipment in ordinary business size; therefore, the first part of this analysis is limited to whether retrieving and reproducing the records involve an extraordinary expenditure of time and effort. Several of the factors the Courier Post court deemed important to a finding of “extraordinary” are present in the instant complaint. The Custodian stated that Fieldsboro is a small municipality that employs no more than four (4) full-time individuals.¹⁰ The Custodian further stated that she only works on an “as-needed” basis and the Deputy Clerk, who works 24 hours a week, must dedicate some of that time to municipal utility duties. The Custodian states that there is one (1) copy machine available to service the municipality. Accordingly, there are a scant number of employees available to accommodate OPRA requests. With just one (1) copy machine available for the municipal workforce to share, copying capabilities are also limited. Here then, there are limited human and technological resources available to search and duplicate thousands of copies of records in order to accommodate the Complainant’s request.¹¹

Because several of the factors establishing “extraordinary” circumstances set forth in Courier Post, *supra*, are present with respect to Fieldsboro, the Custodian must dedicate an “extraordinary expenditure of time and effort to accommodate the request” as is required under N.J.S.A. 47:1A-5.c. Accordingly, the Custodian may charge, in addition to the actual cost of duplicating the record, a special service charge that shall be reasonable and shall be based upon the actual direct cost of providing the copies.

Because a special service charge has been found to be warranted, said charge must be reasonable. The Custodian certified that the Deputy Clerk cannot search the files for the requested records because her limited time at the Borough is taken up with other routine duties. The Custodian certified that it will be necessary for the Custodian to report to the Borough to accommodate the Complainant’s request. The Custodian further certified that she will need to dedicate approximately twenty (20) hours to searching, redacting and/or otherwise preparing the records for disclosure to the Complainant. The Custodian further certified that her hourly rate for performing this service is twenty dollars (\$20.00) per hour. Accordingly, the Custodian’s fee for searching and preparing the records will total four hundred dollars (\$400.00). In addition, the Custodian stated that the copy charges will exceed five hundred dollars (\$500.00). The special service charge will therefore exceed nine hundred dollars (\$900.00), so a five hundred dollar (\$500.00) special service charge deposit is reasonable.

The Custodian certified that she will disclose copies of the requested records to the Complainant upon the Complainant’s payment of a five hundred dollar (\$500.00)

¹⁰ According to the 2000 U.S. Census, Fieldsboro had a population of 522. The estimated 2008 population (the year of this complaint) was 562. See <http://factfinder.census.gov/servlet/SAFFPopulation>.

¹¹ According to the Custodian’s response to question #2, the meeting minutes alone would number approximately 2100 pages, and that is only one (1) item listed in the Complainant’s request.

special service charge deposit. OPRA provides that copies of government records may be purchased upon payment of the fee prescribed by law or regulation. N.J.S.A. 47:1A-5.b. Additionally, in Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006), the Council held that:

“...the Custodian is...not required to release said records until payment is received pursuant to N.J.S.A. 47:1A-5.b., Santos v. New Jersey State Parole Board, GRC Case No. 2004-74 (August, 2004) and Cuba v. Northern State Prison, GRC Case No. 2004-146 (February, 2005).”

Thus, notwithstanding the Custodian’s “deemed” denial, the Custodian in this matter was still not required to release any of the records until the Complainant paid the appropriate charge, which in this case was a five hundred dollar (\$500.00) special service charge deposit.

Because the municipality has scant resources, and because of the extraordinary volume, time, and effort that will be required to fulfill the Complainant’s OPRA request, the \$500.00 special service charge deposit assessed by the Custodian is valid and reasonable pursuant to N.J.S.A. 47:1A-5.c. and the Superior Court’s decision in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191 (Law Div. 2002) and the Custodian properly required payment of said special service charge deposit prior to disclosure of the requested records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).

Whether the Custodian, notwithstanding her “deemed” denial, otherwise unlawfully denied access to the requested records?

OPRA provides that:

“...government records shall be readily accessible for inspection, copying, or examination by the citizens of this State, *with certain exceptions...*” (Emphasis added.) N.J.S.A. 47:1A-1.

Additionally, OPRA defines a government record as:

“... any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been *made, maintained or kept on file ... or that has been received* in the course of his or its official business ...” (Emphasis added.) N.J.S.A. 47:1A-1.1.

OPRA places the onus on the Custodian to prove that a denial of access is lawful. Specifically, OPRA states:

“...[t]he public agency shall have the burden of proving that the denial of access is authorized by law...” N.J.S.A. 47:1A-6.

OPRA provides that government records made, maintained, kept on file, or received by a public agency in the course of its official business are subject to public access unless otherwise exempt. N.J.S.A. 47:1A-1.1. A custodian must release all records responsive to an OPRA request “with certain exceptions.” N.J.S.A. 47:1A-1. Additionally, OPRA places the burden on a custodian to prove that a denial of access to records is lawful pursuant to N.J.S.A. 47:1A-6.

Item #1 of Records Request – The number of cell phones issued and to whom they are issued.

The Custodian’s Counsel contends that Item #1 of the Complainant’s request is not a request for a government record, but rather a request for information. The Complainant did not specifically describe an identifiable government record, but rather asked for a list of information.

The New Jersey Superior Court has held that “[w]hile OPRA provides an alternative means of access to government documents not otherwise exempted from its reach, *it is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Rather, OPRA simply operates to make identifiable government records ‘readily accessible for inspection, copying, or examination.’* N.J.S.A. 47:1A-1.” (Emphasis added.) MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 546 (App. Div. 2005). The Court further held that “[u]nder OPRA, *agencies are required to disclose only ‘identifiable’ government records not otherwise exempt ...* In short, OPRA does not countenance open-ended searches of an agency’s files.” (Emphasis added.) *Id.* at 549.

Further, in Bent v. Stafford Police Department, 381 N.J. Super. 30, 37 (App. Div. 2005),¹² the Superior Court references MAG in that the Court held that a requestor must specifically describe the document sought because OPRA operates to make identifiable government records “accessible.” “As such, a proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency’s documents.”¹³

Additionally, in New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166, 180 (App. Div. 2007) the court cited MAG by stating that “...when a request is ‘complex’ because it fails to specifically identify the documents sought, then that request is not ‘encompassed’ by OPRA...” The court also quoted N.J.S.A. 47:1A-5.g in that “[i]f a request for access to a government record would substantially disrupt agency operations, the custodian may deny access to the record after attempting to reach a reasonable solution with the requestor that accommodates the interests of the requestor and the agency.” The court further stated that “...the Legislature would not expect or want courts to require more persuasive proof of the substantiality of a disruption to agency operations than the agency’s need to...generate new records...”

¹² Affirmed on appeal regarding Bent v. Stafford Police Department, GRC Case No. 2004-78 (October 2004).

¹³ As stated in Bent, *supra*.

Furthermore, in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009) the Council held that “[b]ecause the Complainant’s OPRA requests # 2-5 are not requests for identifiable government records, the requests are invalid and the Custodian has not unlawfully denied access to the requested records pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005) and Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005).”

Therefore, because the Complainant’s request for Item #1 constitutes a request for information and does not identify with reasonable clarity a specific identifiable government record, and because OPRA neither requires custodians to research files to discern which records may be responsive to a request nor requires custodians to create new records, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court decisions in MAG, supra, Bent, supra, and New Jersey Builders Association, supra, and the Council’s decision in Schuler, supra.

Item #2 of Records Request – The total cost per year for cell phones from January 1, 2003 to the date of request.

The Complainant’s request for Item #2 does not identify a specific government record; however, the Custodian’s Counsel acknowledged that the request for this item is valid because there are records available that are responsive to the request. The Custodian also said that the Treasurer can create a document that will have only cell phone bill information on it, along with the number of cell phones issued and to whom the cell phones have been issued. Although the Custodian believes that creation of such a document would be easier than copying each phone bill and redacting most of the information off the bill, the Custodian should not allow such a practice because it circumvents the purpose of OPRA “...to make *identifiable government records* ‘readily accessible for inspection, copying, or examination.’ N.J.S.A. 47:1A-1.” (Emphasis added.) See MAG, supra. Accordingly, the Custodian should disclose copies of the redacted phone bills to the Complainant. The Custodian certified that she would process the Complainant’s request for Item #2 upon receipt of a five hundred dollar (\$500.00) special service charge deposit.

Because the Council has determined that the special service charge deposit assessed by the Custodian is valid and reasonable, the records responsive to request Item #2, copies of the redacted phone bills, shall not be disclosed to the Complainant until the Complainant pays the requested five hundred dollar (\$500.00) special service charge deposit.

Item #3 of Records Request – All e-mail correspondence to/from Edward Tyler and Tim Tyler.

The Custodian certified that Edward Tyler and Tim Tyler do not communicate with each other by e-mail; therefore no records responsive to the Complainant’s request for this item exist. Additionally, the Complainant failed to provide any evidence to contradict the Custodian’s certification. In Pusterhofer v. New Jersey Department of

Education, GRC Complaint No. 2005-49 (July 2005), the Council determined that because the custodian certified that the requested record did not exist, it could not be released; therefore there was no unlawful denial of access.

Because the Custodian certified that she responded to the Complainant indicating that there are no records responsive for Item #2 of the Complainant's request, and because the Complainant failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer, *supra*.

Item #4 of Records Request – Copies of minutes from January 1, 2003 to the date of request.

The Custodian certified that the records responsive to the Complainant's request for Item #4 are council meeting minutes from January 1, 2003 to the date of the Complainant's request. The Custodian further certified that she would process the Complainant's request for Item #4 upon receipt of a five hundred dollar (\$500.00) special service charge deposit.

Because the Council has determined that the special service charge deposit assessed by the Custodian is valid and reasonable, the Complainant's request for Item #4, copies of council meeting minutes from January 1, 2003 to the date of request, shall not be disclosed to the Complainant until the Complainant pays the requested five hundred dollar (\$500.00) special service charge deposit.

Whether the Custodian's delay in access to the requested records rises to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances?

OPRA states that “[a] public official, officer, employee or custodian who knowingly or willfully violates [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, shall be subject to a civil penalty ...” N.J.S.A. 47:1A-11.a.

OPRA allows the Council to determine a knowing and willful violation of the law and unreasonable denial of access under the totality of the circumstances. Specifically OPRA states:

“... If the council determines, by a majority vote of its members, that a custodian has knowingly and willfully violated [OPRA], and is found to have unreasonably denied access under the totality of the circumstances, the council may impose the penalties provided for in [OPRA]...” N.J.S.A. 47:1A-7.e.

Certain legal standards must be considered when making the determination of whether the Custodian's actions rise to the level of a “knowing and willful” violation of OPRA. The following statements must be true for a determination that the Custodian “knowingly and willfully” violated OPRA: the Custodian's actions must have been much more than negligent conduct (Alston v. City of Camden, 168 N.J. 170 at 185 (2001); the James Logue v. Borough of Fieldsboro (Burlington), 2008-223 – Findings and Recommendations of the Executive Director

Custodian must have had some knowledge that his actions were wrongful (Fielder v. Stonack, 141 N.J. 101, 124 (1995)); the Custodian's actions must have had a positive element of conscious wrongdoing (Berg v. Reaction Motors Div., 37 N.J. 396, 414 (1962)); the Custodian's actions must have been forbidden with actual, not imputed, knowledge that the actions were forbidden (Berg); the Custodian's actions must have been intentional and deliberate, with knowledge of their wrongfulness, and not merely negligent, heedless or unintentional (ECES v. Salmon, 295 N.J.Super. 86 (App. Div. 1996) at 107).

Although the Custodian's failure to provide a written response to the Complainant's OPRA request within the statutorily mandated seven (7) business days resulted in a "deemed" denial, because the Custodian did provide for a verbal response to the Complainant on the sixth (6th) business day following the date of the Complainant's request informing the Complainant that the requested records would be disclosed to the Complainant upon the Complainant's payment of a \$500.00 special service charge deposit, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. However, the Custodian's unlawful "deemed" denial of access appears negligent and heedless since she is vested with the legal responsibility of granting and denying access in accordance with the law.

Conclusions and Recommendations

The Executive Director respectfully recommends the Council find that:

1. Although the Custodian verbally notified the Complainant on the sixth (6th) business day following receipt of the Complainant's OPRA request that the Custodian would require a deposit from the Complainant before fulfilling his request, the Custodian's failure to respond in writing to the Complainant's request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., N.J.S.A. 47:1A-5.i., DeLuca v. Town of Guttenberg, GRC Complaint No. 2006-126 (February 2007) and Kelley v. Township of Rockaway, GRC Complaint No. 2007-11 (October 2007).
2. Because the municipality has scant resources, and because of the extraordinary volume, time, and effort that will be required to fulfill the Complainant's OPRA request, the \$500.00 special service charge deposit assessed by the Custodian is valid and reasonable pursuant to N.J.S.A. 47:1A-5.c. and the Superior Court's decision in The Courier Post v. Lenape Regional High School, 360 N.J.Super. 191 (Law Div. 2002) and the Custodian properly required payment of said special service charge deposit prior to disclosure of the requested records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006).
3. Because the Complainant's request for Item #1, the number of cell phones issued and to whom they are issued, constitutes a request for information and

does not identify with reasonable clarity a specific identifiable government record, and because OPRA neither requires custodians to research files to discern which records may be responsive to a request nor requires custodians to create new records, the Custodian has met the burden of proof that access to these records was not unlawfully denied pursuant to the Superior Court decisions in MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534 (App. Div. 2005), Bent v. Stafford Police Department, 381 N.J. Super. 30 (App. Div. 2005), New Jersey Builders Association v. New Jersey Council on Affordable Housing, 390 N.J. Super. 166 (App. Div. 2007) and the Council's decision in Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009).

4. Because the Council has determined that the special service charge deposit assessed by the Custodian is valid and reasonable, the records responsive to request Item #2, copies of the redacted phone bills, shall not be disclosed to the Complainant until the Complainant pays the requested five hundred dollar (\$500.00) special service charge deposit.
5. Because the Custodian certified that she responded to the Complainant indicating that there are no records responsive for Item #2 of the Complainant's request, and because the Complainant failed to provide any evidence to contradict the Custodian's certification, the Custodian has borne her burden of proving that this denial of access was authorized by law pursuant to N.J.S.A. 47:1A-6 and Pusterhofer v. New Jersey Department of Education, GRC Complaint No. 2005-49 (July 2005).
6. Because the Council has determined that the special service charge deposit assessed by the Custodian is valid and reasonable, the Complainant's request for Item #4, copies of council meeting minutes from January 1, 2003 to the date of request, shall not be disclosed to the Complainant until the Complainant pays the requested five hundred dollar (\$500.00) special service charge deposit.
7. **The Complainant shall comply with paragraph 4 and 6 above within five (5) business days from receipt of the Council's Interim Order by delivering to the Custodian (a) a special service charge deposit in the amount of five hundred dollars (\$500.00), or (b) a statement declining to purchase the records. The Complainant's failure to take any action within the five (5) business day period shall be construed the same as (b) above and the Custodian shall no longer be required to disclose the records pursuant to N.J.S.A. 47:1A-5.b. and Paff v. City of Plainfield, GRC Complaint No. 2006-54 (July 2006). Within seven (7) business days from receipt of the Council's Interim Order the Custodian shall provide to the Executive Director a statement with respect to the Complainant's willingness or refusal to purchase the requested records. The**

Custodian's statement shall be in the form of a certification in accordance with N.J. Court Rule 1:4-4.¹⁴

8. The Council defers analysis of whether the Custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances pending the Custodian's compliance with the Council's Interim Order.

Prepared By: John E. Stewart
Case Manager/*In Camera* Attorney

Approved By: Catherine Starghill, Esq.
Executive Director

October 21, 2009

¹⁴ "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
James Logue v. Borough of Fieldsboro (Burlington), 2008-223 – Findings and Recommendations of the Executive Director